

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

TAWANDA HALL, CAROLYN MILLER,  
AMERICAN INTERNET GROUP, LLC,  
ANTHONY AKANDE, CURTIS LEE and  
CORETHA LEE, MARCUS BYERS and  
KRISTINA GOVAN, individually and  
all those similarly situated in  
the City of Southfield,

Plaintiffs,

v.

HON. PAUL D. BORMAN  
No. 20-cv-12230

OAKLAND COUNTY TREASURER ANDREW  
MEISNER, in his official and  
individual capacities, OAKLAND COUNTY,  
SOUTHFIELD NEIGHBORHOOD REVITALIZATION  
INITIATIVE, LLC, CITY OF SOUTHFIELD,  
FREDERICK ZORN, in his official and  
Individual capacities, SOUTHFIELD  
MAYOR KENSON SIVER, in his official  
and individual capacities, SOUTHFIELD  
NON-PROFIT HOUSING CORPORATION, HABITAT  
FOR HUMANITY OF OAKLAND COUNTY INC.,  
SUE WARD-WITKOWSKI, in her former  
official and individual capacities,  
GERALD WITKOWSKI, in his official  
and individual capacities, TREASURER  
IRVIN LOWENBERG, in his official  
and individual capacities, MITCHELL  
SIMON and E'TOILE LIBBETT,

Defendants.

**DEFENDANTS' MOTIONS TO DISMISS**  
(Held Via Videoconference)

**BEFORE U.S. DISTRICT JUDGE PAUL D. BORMAN**  
231 West Lafayette Boulevard  
Detroit, Michigan  
**Tuesday, September 28, 2021**  
**2:12 p.m.**

To Obtain Certified Transcript, Contact:  
Leann S. Lizza, CSR-3746, RPR, CRR, RMR, CRC, RDR  
(313) 234-2608

1 APPEARANCES:

2 For the Plaintiffs:

**JAYSON E. BLAKE**

McAlpine, P.C.

3201 University Drive

Suite 100

Auburn Hills, Michigan 48326

(248) 373-3700

5

**SCOTT F. SMITH**

Smith Law Group

30833 Northwestern Highway

Suite 200

Farmington Hills, Michigan

48334

(248) 626-1962

9

For the Oakland County

10 Defendants:

**MATTHEW T. NICOLS**

Pentiuk, Couvreur & Kobiljak,  
P.C.

2915 Biddle Avenue, Suite 200

Wyandotte, Michigan 48192

(734) 281-7100

12

13 For Defendants City of  
14 Southfield, Zorn, Siver,  
15 Witkowski, Ward-Witkowski  
16 and Lowenberg:

**MICHAEL A. KNOBLOCK**

Seward Henderson, PLLC

210 East Third Street

Suite 212

Royal Oak, Michigan 48067

(248) 733-3580

16

17

18

19

20

21

22

23

24

25

1	<b>TABLE OF CONTENTS</b>	
2	<u>Motion Hearing</u>	<u>Page</u>
3	<b>Motion to Dismiss - Southfield Non-Profit Housing</b>	5
4	<b>Corporation defendants</b>	
5	Argument by Mr. Nicols	5
6	Argument by Mr. Smith	15
7	Further argument by Mr. Nicols	26
8	<b>Motion to Dismiss - Southfield defendants</b>	29
9	Argument by Mr. Knoblock	29
10	Argument by Mr. Smith	39
11	Further argument by Mr. Knoblock	49
12	<b>Motions taken under advisement</b>	51
13		
14		
15	<u>Exhibits:</u>	<u>Received</u>
16	(None offered.)	
17		
18		
19		
20		
21		
22		
23		
24		
25		

## MOTIONS TO DISMISS

4

September 28, 2021

Detroit, Michigan

- - -

(Court and Counsel present; 2:12 p.m.)

THE COURT: Okay. This is Judge Paul Borman presiding in Civil Case Number 20-12230, Tawanda Hall, et al. versus Oakland County, City of Southfield, et al. The motions we're hearing today are the motion of -- against the Southfield Non-Profit Corporation, SNHC [sic]; Revitalization Initiative; Mitchell Simon; and E'Toile, E, apostrophe, T-O-I-L-E, Libbett's motion to dismiss the complaint. And then we're also going to hear the City of Southfield's motion to dismiss the complaint.

We'll start with the one I referenced. We'll call it SNRI. So we're going to -- and then after we hear the argument on that, we'll go to the other one. So for the first case we're going to have Mr. Smith on behalf of plaintiffs and Mr. Nicols on behalf of the defendant. So why don't the attorneys who are going to be arguing this afternoon identify themselves for the record and who their clients are beginning with the plaintiff.

MR. SMITH: Oh, it's Scott Smith for the plaintiff, Your Honor.

THE COURT: Okay. Thank you.

And for the Southfield Non-Profit Housing Corporation?

## MOTIONS TO DISMISS

1 MR. NICOLS: Yes. Good afternoon. Matthew Nicols  
2 appearing on behalf of the defendants, for Southfield  
3 Non-Profit Housing Corp., Southfield NRI, E'Toile Libbett, and  
4 Mitchell Simon.

5 THE COURT: Okay. When you speak, speak slowly and  
6 loudly. If you mention a case name and it's other than Smith  
7 or Freed or Jones, Freed spelling F-R-E-E-D, spell it out and  
8 give a cite to that case as well.

9 So we'll begin with Mr. Nicols, please. Thank you.

10 MR. NICOLS: Thank you, Your Honor. And before I  
11 start, thank you to the -- to Your Honor and your staff for  
12 being accommodating. I apologize for throwing a wrench for  
13 today's in-person hearing, but I wanted everyone to be fully  
14 advised as to the situation. So I appreciate --

15 THE COURT: We appreciate your being up front with  
16 that and allowing us to take this remedial action which because  
17 we have an outstanding IT department here, particularly on this  
18 matter, an outstanding clerk's department with -- and  
19 outstanding chambers of mine, we're able to do this and proceed  
20 today on these important motions. So please proceed,  
21 Mr. Nicols.

22 MR. NICOLS: Thank you, Your Honor.

23 As it pertains to Southfield's Non-Profit Housing  
24 Corporation defendants which include Southfield Neighborhood  
25 Revitalization Initiative who I'd like to refer to as SNRI for

## ARGUMENT BY MR. NICOLS

1 these proceedings, Defendants Libbett and Simon, we're really  
2 just looking at a claim of unjust enrichment following a tax  
3 foreclosure of real property that were previously owned by the  
4 plaintiffs, and the SNRI defendants are -- well, SNRI is a  
5 subsequent transferee of those tax foreclosed properties. I  
6 think the facts are rather --

7 THE COURT: Why don't you [audio interrupted] how they  
8 get to SNRI as a -- start, you know, just a little historical  
9 with the foreclosure. Please proceed. Thanks.

10 MR. NICOLS: Sure. Your Honor, the plaintiffs all  
11 failed to pay property taxes. All of their homes were located  
12 in the City of Southfield. The Oakland County Treasurer  
13 thereafter foreclosed on plaintiffs' properties pursuant to  
14 Michigan's General Property Tax Act after which point the  
15 Oakland County Treasurer obtained a judgment of foreclosure  
16 from the Oakland County Circuit Court, and after that  
17 foreclosure became final, the City of Southfield exercised its  
18 right of first refusal and purchased the plaintiffs' properties  
19 from the Oakland County Treasurer for the minimum bid. That  
20 was under the statute of MCL 211.78m(1).

21 From there the SNRI purchased those properties from  
22 the City of Southfield. The SNRI program was created by the  
23 Southfield Non-Profit Housing Corporation as its sole member,  
24 formed for the purpose of purchasing tax foreclosed homes,  
25 restoring -- completely restoring and improving those homes and

## ARGUMENT BY MR. NICOLS

1 selling those properties to new homeowners in the city to  
2 provide homeownership opportunity throughout the city and  
3 restoring blighted areas.

4 THE COURT: Now, isn't the Mayor Siver, S-I-V-E-R, a  
5 board member and the president of SNPHC which is the sole  
6 member of SNRI?

7 MR. NICOLS: I believe he is on the board of the  
8 Non-Profit Housing Corporation, but he is not in -- he is not a  
9 member of the SNRI.

10 THE COURT: Okay. Okay. I see Mr. Zorn is a  
11 registered agent for SNRI, and he is the city manager of  
12 Southfield?

13 MR. NICOLS: Yes, Your Honor.

14 THE COURT: Okay. Okay. So go ahead.

15 MR. NICOLS: SNRI, its managers, E'Toile Libbett --  
16 Mitchell Simon was at one point. He is no longer manager of  
17 SNRI. Mr. Zorn and Cory Moffitt have since replaced Mr. Simon.

18 THE COURT: Can you re -- spell Moffitt's name to help  
19 Mrs. Lizza, please.

20 MR. NICOLS: Yes, Your Honor. Your Honor, I do not  
21 have the spelling in front of me.

22 THE COURT: Well, we'll spell it M-O-F-F-I-T-T, and if  
23 it's changed, you can let us know later. Go ahead.

24 MR. NICOLS: I will, Your Honor. And if I find it, I  
25 will.

## ARGUMENT BY MR. NICOLS

1 THE COURT: Okay.

2 MR. NICOLS: As it relates to the City's right of  
3 first refusal which was under MCL 211.78M(1), this Court has  
4 already stated in its prior opinion granting Oakland County  
5 Treasurer's motion to dismiss that the right of first refusal  
6 and the subsequent amended statute itself does not provide a  
7 basis for liability against the defendant as it pertains to the  
8 tax foreclosure of this case.

9 The SNRI program is a lawful program. There have been  
10 similar programs throughout the State of Michigan where the  
11 Court of Appeals has looked at those programs and has deemed  
12 those lawful under Michigan law. There's two main cases, the  
13 first being *Rental Properties Owners Association of Kent County*  
14 *versus Kent County Treasurer*. The citation for that case, Your  
15 Honor, is 308 Mich. App. 498, 2014.

16 THE COURT: Thank you.

17 MR. NICOLS: The second case, Your Honor, is *City of*  
18 *Bay City versus Bay City County Treasurer*. Citation for that  
19 case, 292 Mich. App. 146 at page 166, year 2011.

20 THE COURT: Thank you.

21 MR. NICOLS: Under -- in those two cases both the  
22 Court of Appeals found that programs very similar to SNRI  
23 were -- tax foreclosed properties were being purchased to  
24 rehabilitate and restore neighborhoods satisfied a public  
25 purpose requirement under the then-statute. That's really the



## ARGUMENT BY MR. NICOLS

1 basic facts of this case, Your Honor.

2 As far as the legal basis for our motion to dismiss  
3 plaintiffs' claims, I believe that for the same reasons that  
4 this Court granted Oakland County's motions to dismiss on the  
5 basis of res judicata and lack of standing as plaintiffs  
6 Carolyn Miller, American Internet Group, Plaintiff Akande  
7 and --

8 THE COURT: Spell Akande to help Mrs. Lizza, please.

9 MR. NICOLS: Yes, Your Honor. A-K-A-N-D-E.

10 THE COURT: Thank you.

11 MR. NICOLS: You're welcome.

12 I think the same reasons why Oakland County's motion  
13 was granted based on res judicata and lack of standing apply no  
14 differently in the claims against the SNRI defendant, the  
15 Non-Profit Housing Corp. and Libbett and Simon. Both -- the  
16 SNRI were involved in the prior lawsuit, *Hayes versus Oakland*  
17 *County Treasurer, et al.* in Oakland County Circuit Court, Case  
18 Number 17-157366-CZ which was a case that involved claims  
19 involving the same tax foreclosures, claims of discrimination  
20 and housing practices, all again relating to same foreclosures  
21 that the plaintiffs are litigating their current claims here  
22 before this court.

23 THE COURT: You're saying that SNRI was a party to  
24 that --

25 MR. NICOLS: Yes, Your Honor.

## ARGUMENT BY MR. NICOLS

10

1 THE COURT: -- proceeding?

2 MR. NICOLS: And even if some of the defendants were  
3 not specifically named, the doctrine of res judicata would  
4 still apply based on the concept that the unnamed defendants  
5 are essential privies to the SNRI defendant who was named, so  
6 it should apply to those additional defendants as well.

7 THE COURT: How do you get the privy status to give  
8 them a wash?

9 MR. NICOLS: Well, Your Honor, I think it's based on a  
10 relation or a relationship that the defendants are -- well,  
11 it's actually the claims against the named defendant in the  
12 prior action could have at that time been pled against the  
13 unnamed defendant who is also in this action.

14 THE COURT: So let's say SNRI was in there but SNPHC,  
15 Simon, and Libbett were not named plaintiffs -- or defendants.  
16 They weren't named parties in that prior state court action.  
17 Right? So --

18 MR. NICOLS: But based on the -- that's correct, Your  
19 Honor, but based on the -- I believe the relation of the  
20 parties, their interests in the same subject matter would  
21 create privy that would also -- that the concept and doctrines  
22 of res judicata would also apply in those defendants.

23 THE COURT: Okay.

24 MR. NICOLS: Moving from that, Your Honor, I think  
25 addressing the main claim of unjust enrichment against the SNRI

## ARGUMENT BY MR. NICOLS

11

1 and Southfield Non-Profit Housing Corporation is that I think  
2 you should first look to the *Rafaeli* ruling. *Rafaeli*  
3 essentially stated that --

4 THE COURT: Let's just spell to help Mrs. Lizza.  
5 Thank you.

6 MR. NICOLS: Thank you, Your Honor. *Rafaeli* is  
7 R-A-F-A-E-L-I.

8 THE COURT: Thank you.

9 MR. NICOLS: The -- *Rafaeli*, the Supreme Court opinion  
10 that a former owner of tax foreclosed properties as a  
11 compensable takings claim, it's a takings claim if and only if  
12 the taxed foreclosure sale produces a surplus. Plaintiffs'  
13 complaint and claims against the SNRI defendants here,  
14 specifically unjust enrichment, seek to recover what they  
15 define -- describe as surplus equity which is not -- which is  
16 different from surplus proceeds. In the *Rafaeli* case, that  
17 property went to an auction and was sold for amounts that  
18 exceeded the minimum bid or the amounts to redeem the property  
19 from the Oakland County Treasurer. In this case, completely  
20 different; it's a right-of-first-refusal case. So there was no  
21 surplus proceeds after the tax foreclosure sale. There just  
22 weren't any.

23 *Rafaeli*, Justice Viviano in his concurring opinion,  
24 did identify instances under Michigan's General Property Tax  
25 Act where there could be instances where surplus proceeds are

1 not realized or recognized as a result of the way the statute  
2 was drafted. But no other justice of the Michigan Supreme  
3 Court jumped onto that opinion, and the majority of the court  
4 limited that compensable takings claim to only that amount that  
5 exceeds the minimum bid or the surplus proceeds after the sale.

6 This -- the claim of unjust enrichment here looks to  
7 or relies on the plaintiffs' theory that there is law that  
8 establishes a property right to recover surplus equity. But,  
9 in fact, there is no case law to support that. There's no law  
10 that states that the former property owner of tax foreclosed  
11 property has a right to recover surplus equity or essentially  
12 the fair market value of their property less what they owed  
13 taxes. *Rafaeli* only dealt with claims against the foreclosing  
14 governmental unit. *Rafaeli* did not stand for the position that  
15 a former owner of tax foreclosed property may assert a takings  
16 claim or any other claim against the subsequent transferee of  
17 tax foreclosed property.

18 I think Judge Tarnow in a recent opinion looked at  
19 this unjust enrichment claim and summarized it quite well. The  
20 elements among unjust enrichment are twofold: One, that a  
21 defendant receive the benefit from the plaintiff, and, two,  
22 that there's an inequity as a result to the plaintiff.

23 In addressing this -- the case of *Karaus* which is  
24 spelled C-A-R-A-U-S [sic], that the party may have a claim for  
25 unjust enrichment where the defendant did not confer a benefit

## ARGUMENT BY MR. NICOLS

13

1 immediately from the plaintiff. In the situations like that  
2 that requires a plaintiff to allege evidence of misconduct,  
3 wrongdoing or a scheme involving the loss of plaintiffs'  
4 property. And in his opinion in the *Estate of Dell Johnson*  
5 *versus Andrew Meisner, et al.* which did include the same  
6 defendants in this case, Your Honor --

7 THE COURT: State the first name again. Something  
8 Bell? Spell the first name before --

9 MR. NICOLS: Yes. The plaintiff was the Estate of  
10 Dell, D, as in dog, E as echo, L-L.

11 THE COURT: Thank you.

12 MR. NICOLS: Johnson. That is Case  
13 Number 19-CV-11569, and the order I'm referring to is at ECF  
14 Number 125. And as it related to the Estate of Dell Johnson's  
15 claim for unjust enrichment against those defendants,  
16 Judge Tarnow stated that the "plaintiff has not plausibly  
17 alleged such conduct. The plaintiff's allegations are terse,  
18 conclusory, and lack specific support to a claim.  
19 Additionally, plaintiff's allegations merely amount to  
20 defendants' lawful use of Michigan's foreclosure law."

21 I think that's the important thing to focus in on,  
22 Your Honor, is that what it really boils down to in the  
23 plaintiffs' unjust enrichment is that they're complaining that  
24 the defendants followed Michigan's foreclosure law. That  
25 law -- and the actions by those -- by these defendants were not

## ARGUMENT BY MR. NICOLS

14

1 unlawful then, and they weren't unlawful now.

2 I think where I'd like to end off, Your Honor, is as  
3 it relates to the Southfield Non-Profit Housing Corporation  
4 defendant, Mitchell Simon and E'Toile Libbett, I think the  
5 complaint fails to meet the basic pleading standard to raise  
6 plausible inference of wrongdoing by them. If we look to the  
7 complaint, the allegations pled against these defendants appear  
8 only in a few numbered paragraphs. For example, in paragraph 6  
9 the complaint merely states that the Southfield Non-Profit  
10 Housing Corporation is a 501(c)(3) non-profit corp. Similarly,  
11 in paragraph 10, the plaintiffs allege that Defendant Mitchell  
12 Simon is a CPA and treasurer of the Southfield Non-Profit  
13 Housing Corp., and in paragraph 71 more general allegations  
14 about removing properties from the tax rolls. Those are the  
15 only two allegations that involve Mitchell Simon. Likewise,  
16 with Defendant Libbett, he appears in 11, that he is a real  
17 estate broker and a member of the SNRI. Those allegations do  
18 not support or show any wrongdoing to support any type of claim  
19 against them and that those allegations alone, I mean based on  
20 that, these defendants should be dismissed from the case.

21 So with that, Your Honor, I will rest. I would  
22 request a brief minute or two --

23 THE COURT: You have an opportunity to reply since  
24 you're the moving party. So you can reply after the plaintiff  
25 argues, sir.

## ARGUMENT BY MR. SMITH

15

1 MR. NICOLS: Thank you, Your Honor.

2 THE COURT: Right.

3 Mr. Smith, please.

4 MR. SMITH: Thank you, Your Honor.

5 Scott Smith for the plaintiff.

6 First let me start out, Mr. Nicols made an allegation  
7 that there is no takings claim against his clients. I don't  
8 believe it's true. Count 2 states the takings claim against  
9 all his clients. So basically my argument is going to focus on  
10 two claims against Mr. Nicols' clients. One is the unjust  
11 enrichment claim, and one is takings claim.

12 THE COURT: Where is the takings claim in the  
13 complaint?

14 MR. SMITH: It's Count 2.

15 THE COURT: Okay. Okay. Very good. And let's start  
16 with takings. What is that based upon? Do you deny the  
17 statute that permitted the county to foreclose the city to buy  
18 from the county and then going further? Do you deny those laws  
19 create the we'll call that the structure of what we're dealing  
20 with?

21 MR. SMITH: Well, I don't think the laws were -- first  
22 of all, those laws, I believe, are unconstitutional, the right  
23 of first refusal, I believe that *Rafaeli* never dealt with this  
24 specific issue. The only judge that did deal with it was  
25 Judge Viviano where he made a statement -- it may be better to

## ARGUMENT BY MR. SMITH

16

1 quote it so I don't mess it up. He says, Judge Viviano says --  
2 one second.

3 THE COURT: Sure. There's no rush.

4 MR. SMITH: He says, "Consequently, I would not rule  
5 out the possibility that 'just compensation' might require  
6 something greater than the surplus in a particular case,  
7 especially in cases in which the government purchased the  
8 property for the minimum bid." And he says, "We have no reason  
9 to decide this issue in this case because, although the  
10 plaintiffs nominally distinguish equity and surplus, they offer  
11 no argument to suggest that the tax foreclosures here failed to  
12 obtain a fair price for the properties."

13 Well, we're suggesting very strongly --

14 THE COURT: Let me ask you this, Mr. Smith. This  
15 appears then to be dicta from Justice Viviano and also from a  
16 justice who is one out of seven on the Michigan Supreme Court.  
17 So how can that be authority to support your argument?

18 MR. SMITH: Well, what I'm saying is, is that his  
19 statement along with the facts that we had a case almost  
20 identical to this remanded from the Michigan Supreme Court  
21 which they said the behavior was unconscionable leads one to  
22 believe that the Michigan Supreme Court have not really decided  
23 this issue. And also, as you know, as you noted in one of your  
24 opinions, the legislature basically repealed this law and it  
25 heavily implied it was repealed because it was



## ARGUMENT BY MR. SMITH

17

1 unconstitutional. That might be dicta, but in the prior law if  
2 the State of Michigan had purchased the property which was a  
3 consideration, they would have had to pay fair market value.

4 Now -- and this is in the right of first refusal.

5 So basically by not entertaining this takings claim --  
6 and there's two ways to consider it, under Michigan in Takings  
7 Clause, which *Rafaeli* only was determined under Michigan  
8 Takings Clause, and the federal Fifth Amendment Takings Clause.

9 And so, accordingly, if you just try to limit by a  
10 couple sentences that are always said, ignoring all the  
11 background of the case that this only involved surplus from  
12 a -- an auction and you don't consider when there's no auction,  
13 you're basically making an unconstitutional former statute.  
14 You have two classes of people. You have people whose property  
15 went to auction and property that was just taken by the State.  
16 And the *Rafaeli* and other places talks about the legacy of the  
17 Michigan common law under Judge Cooley -- Justice Cooley.

18 THE COURT: And let me ask you this question,  
19 Mr. Smith. On page 7 of your response to the Defendants'  
20 motion to dismiss, your brief states in the last four lines on  
21 that page, "There still is no adequate remedy or procedure to  
22 to address the unlawful conduct in this case until the Michigan  
23 legislature finds *Rafaeli, LLC, supra* retroactive. Even then,  
24 ambiguity will persist (see Justice Viviano's concurrence in  
25 *Rafaeli, LLC, supra*)."

1 Are you basically saying that right now there is no  
2 adequate procedure and you're asking this court to create a  
3 procedure even though we're not in the business of legislating  
4 ever?

5 MR. SMITH: No. I understand that. But the Court  
6 could -- could ask -- could certify the question of Michigan  
7 Supreme Court and the questions going back to the Michigan  
8 Supreme Court because *Rafaeli* is on appeal again. The law is  
9 unsettled. And it's because Oakland County Circuit  
10 Judge Langford-Morris failed to find it retrospective even  
11 though the decision was in that case and it's only applied  
12 prospectively.

13 Furthermore, you're hitting upon another thread that I  
14 think is a new development. There's a case called *Harrison*  
15 *versus Montgomery County* which was -- I'll give you a cite for  
16 it. It's so new it hardly has a cite, but it was decided  
17 May 11th, 2021, and the cite so far is 2021 U.S. App. Lexis  
18 13883.

19 THE COURT: Which court is that, Mr. Smith, if you can  
20 help us?

21 MR. SMITH: It's the Sixth Circuit, United States  
22 Sixth Circuit Court of Appeals.

23 THE COURT: Okay. So that's our court. Okay. And is  
24 that -- you know if that's published or unpublished? Does it  
25 state that? And the date you said was May 11th, 2021. Okay.

## ARGUMENT BY MR. SMITH

19

1 MR. SMITH: Yes, I believe it's going to be published,  
2 that's my understanding.

3 THE COURT: Okay.

4 MR. SMITH: And it's really more analogous especially  
5 in the federal law to this case than any of the precedent so  
6 far because what it involved was looking at the SNRI's behavior  
7 in its best light is -- they're claiming it's a public purpose  
8 which is a statement of fact, keep people in their homes.  
9 Well, the people were already in their homes. There's no --  
10 if -- we state there's absolutely no blight. A lot of these  
11 houses are well above the median home price in Michigan.  
12 They've done no work on them. There's no public purpose.

13 But getting back to *Harrison*, *Harrison* was a case that  
14 impacts this case in multiple ways. First of all, it was about  
15 a Ohio law which you could avoid a tax auction by the  
16 determination that the house was in poor condition and they  
17 would send it to a land bank --

18 THE COURT: Does the fact that, sir -- does the fact  
19 that it's Ohio law and we're dealing with Michigan law here  
20 take it out of consideration by this court in Michigan?

21 MR. SMITH: I don't believe so because the statute's  
22 very similar. And they're dealing -- and Justice Sutton, who  
23 wrote this opinion, he made a number of points as far as  
24 federal takings claims.

25 First of all, same exact situation where there was no

1 auction, that the legislature created a system where they could  
2 bypass the auction process supposedly for public purpose. Even  
3 so, they said you can't do that; you have to give someone a  
4 chance to get their equity under the United States Fifth  
5 Amendment.

6 There was also the preclusion issue. The res judicata  
7 issue -- excuse me. Res judicata issue which the court --  
8 which clearly said that there was a trap, a catch-22 because  
9 during the case, just as in this case, the *Knick* decision was  
10 decided.

11 THE COURT: Spell that.

12 MR. SMITH: K-N-I-C-K.

13 THE COURT: Okay.

14 MR. SMITH: It's a Supreme Court decision of the  
15 United States which basically got rid of the Williamson test of  
16 ripeness. During this case none of my clients had access to  
17 federal court not only because of the ripeness thing, they  
18 would have to go in state court where they had no right and  
19 then it would be res judicata. The Court in *Harrison versus*  
20 *Montgomery County* said when your rights are impaired, you don't  
21 have a clear choice. Then if you proceed in the state system,  
22 they can say it's res judicata. It puts an impediment on your  
23 access to the court. This is exactly what happened here. So  
24 this undercuts their preclusion argument on res judicata. It's  
25 the same, exact situation. And obviously the Sixth Circuit,

1 the recent decisions, are trying to protect people's property  
2 rights under the Fifth Amendment. In this case it's absolutely  
3 no ability.

4 Now, when this case goes back to the Supreme Court  
5 whether by a federal circuit applying *Rafaeli* or by another  
6 similar state case, the Supreme Court is going to have to  
7 decide whether the new statute which would not permit this type  
8 of inequity -- everyone agrees it's unfair; the question is --  
9 many jurists have said that, from Judge Berg to Judge Shapero  
10 in Michigan, to Judge Kethledge, I believe his name is.

11 THE COURT: Kethledge.

12 MR. SMITH: Thank you. I'm sure you personally know  
13 him; I don't. Have said there's no question it's unfair; the  
14 question is how do you enforce people's property rights.

15 So I mean we've covered a lot of different issues with  
16 one case, but I do not agree as it sits right now, even people  
17 whose houses went to auction within the statute of limitation  
18 have no rights in Michigan at least in Oakland County, and  
19 certainly my clients which is a finite set of people who --  
20 let's talk about something. You know, Mr. Nicols said a lot of  
21 things except it's obviously true and it has been pled that the  
22 Southfield government and his clients are totally intertwined.  
23 And one's a private company. And no one -- I don't think the  
24 legislature, when they created them, most likely  
25 unconstitutional right of first refusal under the old

## ARGUMENT BY MR. SMITH

22

1 MCL 211.71m(1) were envisioning or the authorities that he  
2 mentioned, Kent County, envisioned a private third party taking  
3 these properties for no public purpose which is a issue of  
4 fact, but for this motion it should be considered as true --

5 THE COURT: When you say for no public purpose, aren't  
6 they taking the properties to rehabilitate, to sell them and to  
7 improve the city's housing?

8 MR. SMITH: I have at least a score of clients who  
9 still live in their houses. They're valued at over \$300,000.  
10 They have no lien. They only lost the house for sometimes as  
11 little as four or five thousand dollars. What public purpose  
12 is that? And meanwhile, under oath Mr. -- in the bankruptcy  
13 court Mr. Zorn admitted that they had up to that point, a year  
14 ago, netted over \$14 million for themselves which they didn't  
15 have to put back into the case.

16 And really the analysis here is more like a fraudulent  
17 transfer analysis which there was a recent case by  
18 Judge Nicholson of -- in the same fact situation called  
19 *Robinson versus the Southfield Neighborhood Revitalization*  
20 *Initiative* which found that this whole idea of selling these  
21 houses was a constructively fraudulent conveyance because it  
22 had no -- there's absolutely no way for these people to get any  
23 value out of their homes. That's a recent decision, July.  
24 It's been remanded to the bankruptcy court.

25 And also, Your Honor, more directly on the argument,

## ARGUMENT BY MR. SMITH

23

1 the defendants in this motion seem to conflate [indiscernible]  
2 with an unjust enrichment claim. Shall I proceed, Your Honor?

3 THE COURT: Please. Yes.

4 MR. SMITH: There's -- obviously there's two separate  
5 causes of action, unjust enrichment and a takings claim, but  
6 it's interesting to note one of the bases of the *Rafaeli* case  
7 to say that there was a common law right was an unjust  
8 enrichment case when the government in the case called *Dean*,  
9 it's on -- I think it's on page 32 of the *Rafaeli* decision --

10 THE COURT: Spell *Dean*. Spell *Dean*, please.

11 MR. SMITH: D-E-A-N versus State of Michigan.

12 THE COURT: Thank you.

13 MR. SMITH: That's in the *Rafaeli* main decision. And  
14 the facts are is that in this case instead of giving it to a  
15 city, the state took the property and sold it for \$10,000. The  
16 court found that there was a viable unjust enrichment case, and  
17 *Rafaeli* uses that as a basis to say that there is common law in  
18 Michigan that represented people's property and that -- if the  
19 state took the property without giving them an opportunity to  
20 get surplus, and that was permitted.

21 More specifically, in the Eastern District of -- court  
22 of -- the fact that the Southfield Neighborhood Revitalization,  
23 LLC recorded a deed where they got the property for \$1 isn't --  
24 the first transferee is undercut by a case by Judge Leitman,  
25 Matthew Leitman, in the *Kerrigan* decision. It's in my brief,

1 and which stands for the proposition that you can have an  
2 unjust enrichment cause of action. You can have that where the  
3 beneficiary is unjustly enriched and has involvement or  
4 misleads people.

5 This whole program of getting this -- these houses to  
6 the LLC is misleading. It serves no public purpose. We should  
7 have a right to develop a record on that -- on those issues.  
8 We've had no discovery even though there are public resolutions  
9 that make it perfectly clear. Although they misstate the  
10 facts, they say it's going to Habitat for -- of Humanity as  
11 opposed to a insider-created Southfield Neighborhood  
12 Revitalization Initiative. So I think the law on unjust  
13 enrichment both in the *Dean State of Michigan* case and as  
14 interpreted by the Eastern District in the *Kerrigan versus*  
15 *Vi* -- I don't know if I say this right, versus *Visalus*, I  
16 believe.

17 THE COURT: Spell it, please.

18 MR. SMITH: I knew you were going to ask me to do  
19 that.

20 THE COURT: Well, you can come back to it later and  
21 give us that when you argue the other side. So, okay.

22 MR. SMITH: I have five minutes. There's a lot of  
23 layers to this.

24 THE COURT: Okay. You have five more minutes on this  
25 issue, then we'll go over to the brief reply and then we'll do



1 the other case.

2 MR. SMITH: Well, I think I've hit most of the points.  
3 I mean the -- what the SNRI did is misleading because it says  
4 it was going to fight blight and also because it was going to  
5 prevent rentals, but they, in fact, just sold the house and  
6 created -- they just stripped the equity, sometimes hundreds of  
7 thousands of dollars. It wasn't put back in the city; it  
8 wasn't a public purpose. It was misleading.

9 And I think just two more points. I think you have to  
10 make a distinction when a property is sold to pay the taxes at  
11 an auction and where it's the actual government moving around  
12 these properties and profiting. I mean goes back to what  
13 Justice Cooley said, that you -- the state should only take  
14 what is needed to pay the taxes.

15 And, finally, I covered this in my brief, even though  
16 the Southfield Neighborhood Revitalization Initiative and  
17 Non-Profit and people who control those and those Southfield  
18 officials who were -- the Michigan Court of Appeals said their  
19 behavior was unconscionable and didn't give people faith in  
20 government. Beyond that I did -- in section 3 of my brief in  
21 this matter, this has been awhile back, is a lot of case law  
22 where a nongovernment official, an entity of -- acts in concert  
23 with state officials, the public officials -- that they can be  
24 held liable under 42 U.S.C. 1983, again, the Takings Clause.  
25 One of the more recent cases is the Sixth Circuit case called

## FURTHER ARGUMENT BY MR. NICOLS

1     *Siefert versus Hamilton County*, 951 F.3d 753, 2020.

2             So I think Southfield and Mr. Nicol's clients are  
3     totally intertwined in something that doesn't serve a public  
4     purpose. It unjustly enriches them. There's no  
5     accountability. There's tens of millions of dollars floating  
6     out there. Just -- and it's interesting, these houses, they  
7     don't pay any taxes, property taxes, on these houses. They say  
8     that the SNRI is a part of a non-profit. They take them off  
9     the tax rolls. How that's helping the City of Southfield, I  
10    don't see how that's plausibly suggested. So --

11            THE COURT: Okay.

12            MR. SMITH: So for those reasons, I think we've -- we  
13    have two plausible counts. Now --

14            THE COURT: Okay. You've argued those. Okay.

15            MR. SMITH: I thank you for your time, Your Honor.

16            THE COURT: Okay. Mr. Nicols, do you want to respond  
17    briefly?

18            MR. NICOLS: Yes, Your Honor.

19            THE COURT: Yes.

20            MR. NICOLS: Two, maybe three quick points.

21    Addressing plaintiffs' assertion that they have raised the  
22    takings claim against the Southfield NRI, the Non-Profit  
23    Housing Corp., that is just not what the pleadings indicate.  
24    In fact, in their Count 2 of Plaintiffs' complaint, the only  
25    named defendants that appear in any of these allegations are

## FURTHER ARGUMENT BY MR. NICOLS

1 Defendants Oakland County and Defendant Southfield. If the  
2 county -- Oakland County Treasurer and the City of Southfield.  
3 Nowhere in any of their factual allegations or any counts  
4 involving the takings claim do they include any statements or  
5 allegations against the SNRI or the Non-Profit Housing  
6 Corporation.

7 Furthermore, in response to the argument that the SNRI  
8 or the Non-Profit Housing Corp. are state actors, I disagree.  
9 I think you have to look at who was the entity that's enforcing  
10 the most important order here. In the plaintiff's case that's  
11 the judgment of foreclosure and that's the general --  
12 Michigan's General Property Tax Act. The defendant who was  
13 enforcing that law and those judgments of foreclosure was the  
14 Oakland County Treasurer. The Non-Profit Housing Corporation,  
15 SNRI, or Defendants Simon or Libbett had zero involvement in  
16 the tax foreclosure process, Plaintiffs' obligation to pay  
17 taxes, their failure to pay taxes and the resulting foreclosure  
18 of their properties on that basis. And furthermore, there's --  
19 the entwinement series is not pled in the complaint.

20 Quick point number two about the bankruptcy case --

21 THE COURT: It is pled in Mr. Smith's response to your  
22 motion, the entwinement matter.

23 MR. NICOLS: It's in the brief, Your Honor.

24 THE COURT: It was.

25 MR. NICOLS: And we did address that in our reply --

## FURTHER ARGUMENT BY MR. NICOLS

1 THE COURT: Right.

2 MR. NICOLS: -- that I submitted to the Court.

3 THE COURT: Gotcha. Okay.

4 MR. NICOLS: Regarding the bankruptcy case that  
5 counsel mentioned, *In Re Patrice Robinson*, that case involves a  
6 claim that can only be brought under the bankruptcy code, the  
7 constructive fraudulent transfer under 11 U.S.C. Section 548.  
8 That has no bearing with any of the claims, facts or  
9 allegations in this case. That's a bankruptcy court case. The  
10 bankruptcy court claim and that case is still being litigated  
11 before the United States bankruptcy court in the Eastern  
12 District of Michigan. There's been no final determination on  
13 the merits of that claim for constructive fraudulent transfer.

14 And then lastly, Your Honor, as relates to unjust  
15 enrichment, I think that *Rafaeli* ever -- I recall in the  
16 *Rafaeli* opinion, you know, they indicated that when addressing  
17 a situation where -- I think they were addressing the  
18 plaintiff's argument for unjust enrichment, and the reason why  
19 they rejected that theory was that if they -- if defaulting  
20 taxpayers were able to recover fair market value of their  
21 properties, they would be benefitting, they themselves would be  
22 benefitting from their failures to pay property taxes. So with  
23 the theory of unjust enrichment, I think the plaintiffs are  
24 trying to essentially flip things around and benefit themselves  
25 from their own failure to pay property taxes.

## ARGUMENT BY MR. KNOBLOCK

1           And with that, Your Honor, I'll turn it over to  
2 counsel for the City.

3           THE COURT: We're going to take a humanitarian break  
4 for Mrs. Lizza and a couple others. So why don't we --  
5 Mrs. Lizza, ten?

6           THE REPORTER: Ten minutes is fine, Judge.

7           THE COURT: Okay. We'll take a ten-minute break and  
8 then resume with the second motion. Thank you.

9           MR. SMITH: Thank you, Your Honor.

10          (Court in recess; 3:04 p.m. to 3:14 p.m.)

11          THE COURT: Counsel for the City of Southfield, et  
12 al. to proceed and then Mr. Smith will respond. Please  
13 proceed, sir.

14          MR. KNOBLOCK: Yes, thank you, Your Honor. And good  
15 afternoon. Michael Knoblock appearing on behalf of the City of  
16 Southfield, Frederick Zorn, Kenson Siver, Sue Ward-Witkowski,  
17 Gerald Witkowski, and Irvin Lowenberg.

18          THE COURT: Thank you.

19          MR. KNOBLOCK: And Mr. Nicols mentioned in his  
20 argument this court has already decided the Oakland County's  
21 motion to dismiss, and in that opinion and order this court  
22 addressed many of the same issues that are dispositive to our  
23 motion as well --

24          THE COURT: If you speak a little slower -- if you  
25 speak a little slower, that will help Mrs. Lizza. Thank you,

1     sir.

2                 MR. KNOBLOCK: Certainly, Your Honor.

3                 Under the doctrine of the law of the case, a decision  
4     on an issue that's made by the court at one stage of the case  
5     should be given effect in successive stages of the same  
6     litigation. And this court recognized that in its opinion in  
7     *McNulty, M-C-N-U-L-T-Y, versus Arctic Glacier, Incorporated.*  
8     That's number 08-CV-13178, 2016, Westlaw 465490 at page 17, and  
9     that's a February 8th, 2016, order of this court.

10                And this court also recognized that a court's power to  
11     reach a result inconsistent with prior decision reached in the  
12     same case is to be exercised very sparingly and only under  
13     extraordinary circumstances.

14                As it pertains to the issue of res judicata, this  
15     court found in its opinion granting Oakland County's motion to  
16     dismiss that the state court complaint filed by plaintiffs  
17     Miller, American Internet Group, and Akande were based on the  
18     same allegations in this case, and that's in the court's  
19     opinion at Page ID 2195.

20                This court also found that it was an adjudication on  
21     the merits for purposes of res judicata, and that's at  
22     Page ID 2197.

23                This Court further found that the prior lawsuit and  
24     this suit involved the same core set of facts and the issues in  
25     this case were or could have been raised in that prior suit.

1 And that's at page 2200.

2 The Court also found that the parties were  
3 substantially identical, and it relied on *Lyons versus*  
4 *Washington*. Lyons spelled L-Y-O-N-S, and that's Number 212516,  
5 citation is 2000 Westlaw 33407429, and that's a Michigan  
6 Appellate Court decision from 2000. And relying on that case  
7 it found that the parties are substantially identical even  
8 though I believe it was only Mr. Meisner was named in the  
9 original state court suit because under that case companies and  
10 employees can be found in privity. And the same applies here  
11 for Southfield and any of its employees.

12 The Court further found that *Rafaeli* was not an  
13 intervening change in law that would preclude the application  
14 of res judicata, and that was at Page ID 2201. So here the law  
15 of the case applies and res judicata precludes Miller, American  
16 Internet Group, and Akande's claims.

17 For similar reasons, Miss Hall's claims are also  
18 precluded by res judicata. This is Miss Hall's second lawsuit  
19 in this case that involves the same parties and the same core  
20 set of facts, and that was in her first lawsuit, 18-CV-14086,  
21 and her complaint is at ECF Number 9.

22 That first lawsuit she agreed to dismiss with  
23 prejudice under Rule 41, and that's at ECF Number 21 in that  
24 case, and under the case of *Warfield versus Allied Signal PBS*  
25 *Holding*, Warfield spelled W-A-R-F-I-E-L-D, versus Allied

1 Signal, A-L-L-I-E-D, S-I-G-N-A-L. That's a final adjudication  
2 on the merits and has a res judicata effect. So for that  
3 reason Miss Hall is also precluded under the doctrine of  
4 res judicata.

5 This Court also addressed Mr. Byers -- yes, I'm sorry,  
6 Mr. Byers' standing in its orders dismissing Oakland County,  
7 and it found -- and recognized that an interest in real  
8 property under Michigan law can only be created by act or  
9 operation of law or by a deed or conveyance in writing pursuant  
10 to *U.S. versus Real Property Located at 4527 to 4535 Michigan*  
11 *Avenue*, and the citation for that is 489 Federal Appendix 855  
12 at page 857.

13 The Court found that Mr. Byers had no interest in the  
14 subject property when foreclosure and transfer occurred and  
15 therefore he lacks standing, and that's at Page ID 2204.

16 As to Counts 1 and 3 which are -- all relate to this  
17 alleged taking of equity in the property, this court cited to  
18 *Nelson versus City of New York* --

19 THE COURT: If you slow down -- if you slow down, that  
20 will help Mrs. Lizza because you know it but we're learning it,  
21 at least Mrs. Lizza is. I've had the pleasure of doing it  
22 already, as has opposing counsel, but to help Mrs. Lizza, just  
23 slow down a little. Thank you.

24 MR. KNOBLOCK: Certainly, Your Honor. I apologize. I  
25 just get so excited about this. Again, that's *Nelson versus*



1     *City of New York*, 352 U.S. 103, and that's a 1956 case. And in  
2     this case the court recognized that a property interest in  
3     surplus exists only if provided from an independent source such  
4     as state law and federal law does not recognize a former  
5     property owner's interest in potential equity after a  
6     foreclosure. That was at Page ID --

7             THE COURT: Let me ask a question. I'm not seeing  
8     Mrs. Lizza, any light on around her. Is there something  
9     that -- now, it's getting better.

10            (The court reporter clarifies.)

11            THE COURT: Sorry to interrupt, sir. Talking about  
12     the *Nelson* case, Mr. Knoblock.

13            MR. KNOBLOCK: Certainly. Thank you, Your Honor. And  
14     that was at Page ID 2209 of this court's decision.

15            Recognizing that such a property interest has to flow  
16     from an independent source such as state law, the court  
17     recognized that Michigan Supreme Court in *Rafaeli* found that  
18     only property interest in surplus proceeds from a foreclosure  
19     sale if any is what survived the tax foreclosure, and that was  
20     at Page ID 2207.

21            Applying this law of the case, plaintiff has failed to  
22     state a claim in Counts 1 through 3 because they've not  
23     identified any independent source of law that gives them this  
24     property right that they claim to have in this alleged equity.

25            Importantly, *Rafaeli* also provides no basis for

1 asserting these claims against the subsequent purchaser of  
2 foreclosed tax property like the City of Southfield. Under  
3 MCL 211.78(8)(a), Oakland County is the foreclosing  
4 governmental unit under the GPTA not the City of Southfield.  
5 The City of Southfield has no involvement in the foreclosure  
6 process. Moreover, for takings, a person must be the property  
7 owner at the time of the taking. And that's pursuant to *U.S.*  
8 *versus Dow*, D-O-W, 357 U.S. 17, pages 20 to 21 and that's a  
9 1958 case.

10 When the City of Southfield exercised its right of  
11 first refusal pursuant to the GPTA, plaintiff no longer owned  
12 the property and therefore has no taking claim against the City  
13 of Southfield. When the government like Oakland County takes  
14 control of the property, it loses its characteristic as private  
15 property and becomes public to the extent that it's not subject  
16 to a takings claim, and that was stated in *State of North*  
17 *Carolina versus the United States*, 725 F. Supp. 874 at pages  
18 876 to 877, and that's an Eastern District of North Carolina,  
19 1989, case.

20 Also, in the *Estate of Dell Johnson* case that  
21 Mr. Nicols mentioned at page 12, Judge Tarnow recognized that  
22 plaintiff has not shown and the court has not found authority  
23 stating the recipients of property from a governmental agency  
24 which took property from the owner can be held liable under the  
25 Takings Clause. I, too, had spent many hours looking for such

1 a connection or the ability to state a claim to somebody in  
2 that position, and I've not been able to locate any either.

3 Now, as it relates to the due process claims which  
4 would be Count 5 procedural, Count 6 substantive, we run into  
5 issues again of this property interest because a requirement  
6 for either a procedural due process or a due process claim  
7 requires identifying a property interest. Here there is none  
8 which this court has already found, so those claims fail on  
9 that alone.

10 As far as the procedural due process claim, first of  
11 all, there are no allegations in the complaint regarding the  
12 Southfield defendants. The only allegations that are in the  
13 complaint relate to these alleged payment plans that the  
14 plaintiffs had with the Oakland County Treasurer before the  
15 foreclosure process. The City of Southfield and the other  
16 Southfield defendants had no involvement in the foreclosure or  
17 any of these payment plans. So they've failed to state any  
18 factual basis for this claim against the City of Southfield.

19 THE COURT: Okay.

20 MR. KNOBLOCK: Also, this court recognized in its  
21 prior decision at pages 2212 and 2213 that for a procedural due  
22 process claim they need to recognize the protected property  
23 interest, a deprivation of that interest and a failure to  
24 provide adequate procedural rights before that deprivation  
25 occurred. Here again, they've not identified the property

1 interest nor are there any allegations of any of the Southfield  
2 defendants depriving them of that interest or that the City of  
3 Southfield failed to provide any kind of procedural rights  
4 prior to the foreclosure which it already has zero involvement.

5 As it relates to the substantive due process claim,  
6 this court recognized that -- pages 2216 to 2217 that other  
7 courts have considered similar substantive due process claims  
8 regarding this equity that are arbitrary and shock the  
9 conscience. And the Court recognized that these type of claims  
10 cannot be used basically as a stand-in for a takings claim.  
11 And, in fact, in *Ostipow*, O-S-T-I-P-O-W, *versus Federspiel*,  
12 F-E-D-E-R-S-P-I-E-L, and that's 824 Federal Appendix 336 at  
13 page 345, the court stated that substantive due process claims  
14 are viewed with a dose of skepticism and cannot be used as a  
15 stand-in to address a failed takings claim --

16 THE COURT: Which Court of Appeals is *Ostipow*?

17 MR. KNOBLOCK: I'm sorry. That's a Sixth Circuit case  
18 and that's from 2020.

19 THE COURT: Okay. Thank you. Okay.

20 MR. KNOBLOCK: You're welcome, Your Honor.

21 That's exactly what plaintiffs are attempting to do  
22 here, is basically here's our takings claim and even if you  
23 don't want to find that, find our substantive due process  
24 claim, and they can't do that. As it relates to, I'll call it  
25 Count 7, it was a second Count 6 in the complaint, is an unjust

1 enrichment claim. Again, there's no allegations regarding the  
2 Southfield defendants in the complaint. If you look to the  
3 complaint, it states that SNRI obtained equity, SNRI obtained  
4 equity through a transfer of inadequate value and that SNRI  
5 retained that equity resulting in this, quote, unjust  
6 enrichment to the SNRI, unquote. So clearly there are no  
7 allegations in the complaint as it relates to the Southfield  
8 defendants being unjustly enriched. And the Court has already  
9 found no cognizable interest in the alleged property equity, so  
10 there's nothing that the defendants could be enriched by or  
11 anything to unjustly take from the plaintiffs.

12 Moreover, when a defendant receives a benefit from the  
13 third party not directly from the plaintiff, there's no receipt  
14 of the benefit from the plaintiff that's required for this  
15 claim. And that's pursuant to *Karaus*, that's K-A-R-A-U-S,  
16 *versus Bank of New York Mellon*, 300 Mich. App. 9 at page 23,  
17 and that's a 2012 case.

18 Now, plaintiff said --

19 THE COURT: That was previously -- just to help  
20 Mrs. Lizza, I think when -- in the previous argument *Karaus*,  
21 they stated it was with a C, but it's with a K, that's correct.  
22 Thank you. As in Knoblock. Okay.

23 MR. KNOBLOCK: Thank you.

24 Now, the plaintiff has said that, well, hold on a  
25 second, you can be liable as a third party for unjust

1 enrichment if you actively mislead somebody, and that's rely --  
2 they rely on the *Kerrigan* case that Mr. Smith discussed.  
3 However, there's also another case, *Reid versus Bank of*  
4 *America*, Reid spelled R-E-I-D. That's number 18-CV-12099, and  
5 that's 2019 Westlaw 355655 at page 5.

6 In order to sustain that type of claim, the plaintiff  
7 must allege facts to show how or when someone was misled for  
8 *Kerrigan* to apply. Here, plaintiff is only pointing to actions  
9 that were taken pursuant to a lawfully enacted Michigan  
10 statute, the GPTA, as it relates to the City exercising its  
11 right of first refusal. And the court recognized this at  
12 page 2209 of its decision granting Oakland County's motion to  
13 dismiss where this court stated, "It is undisputed that the  
14 properties were foreclosed on by the Oakland County defendants  
15 and then transferred to the City of Southfield pursuant to and  
16 in full compliance with the GPTA. Plaintiff's conclusory  
17 allegations of some scheme to the contrary are insufficient."  
18 And that's very apt because that's exactly what they're trying  
19 to propose to this court, conclusions. Mr. Smith believes that  
20 it was wrong. Mr. Smith believes that it's illegal yet he  
21 points to no authority to support these claims. All they are,  
22 conclusory allegations that are not entitled to the truth under  
23 the 12(b)(6) standard.

24 THE COURT: Let me ask a question with regard to  
25 *Kerrigan*. Is it with a C or a K?

## ARGUMENT BY MR. SMITH

39

1 MR. KNOBLOCK: I'm sorry. *Kerrigan* is with a K.

2 THE COURT: Thank you. Okay. Go ahead.

3 MR. KNOBLOCK: And that's all I have, Your Honor,  
4 unless you have any questions for me.

5 THE COURT: No. You're the moving party, so I'll give  
6 you an opportunity to respond after -- to reply after the  
7 plaintiff responds. Thank you.

8 MR. KNOBLOCK: Thank you, Your Honor.

9 MR. SMITH: Thank you, Your Honor. Scott Smith for  
10 the plaintiffs. I believe Mr. Knoblock gave you the cite you  
11 asked for previously, *Kerrigan*.

12 THE COURT: Right, right.

13 MR. SMITH: A number of points. What counsel did not  
14 mention which I believe is a game changer is the *Harrison*  
15 *versus Montgomery* case and -- which talks about the  
16 res judicata issues, and unless for the record you want me to  
17 go over those, I would stand on what I said previously in my  
18 last motion about --

19 THE COURT: Okay. It is in the record and fortunately  
20 Mr. Knoblock was here when it was discussed so you can proceed  
21 further. Thank you, Mr. Smith.

22 MR. SMITH: Okay. And then another theme of the  
23 Southfield Defendants' defense is they talk a lot about the  
24 title to the property, and then which is sort of, you know,  
25 hypocritical. Then they talk about reliance on a Supreme Court

## ARGUMENT BY MR. SMITH

40

1 case, *Rafaeli*, which says that title has nothing to do with the  
2 rights. So they're trying to make a res judicata argument  
3 where, A, there's different defendants; B, where the timing of  
4 the right where they say doesn't exist for our clients is  
5 different. To make it a little more concrete, normally a  
6 takings claim occurs at the foreclosure when people -- the  
7 property owners lose the right to the property. What *Rafaeli*  
8 seemed to say was in that fact situation, which is different  
9 than this fact situation, that the harm comes, the cause of  
10 action comes when the property is sold at auction for more than  
11 the taxes. So if the Court wants to use *Rafaeli* as the basis  
12 of a conclusion, doctrine of res judicata, we're talking about  
13 two different moments in time with different parties and  
14 under --

15 THE COURT: Well, let me ask this question, Mr. Smith.  
16 The takings that occurred in the foreclosure by the county on  
17 the property; is that correct? That's when the official taking  
18 occurred. And thereafter the transfers, you're saying those  
19 are new takings? Because the taking was when the county  
20 foreclosed on the properties, end of story. But you're saying  
21 it's not the end of the story.

22 MR. SMITH: No, I don't -- what you say is rational,  
23 but I don't think it's where the law is right now. Under -- or  
24 there's contradictory threads to it.

25 Under federal law, under the *Knick* case --



## ARGUMENT BY MR. SMITH

41

1 THE COURT: Say that, the name of that case again.

2 MR. SMITH: It's *Knick*, K-N-I-C-K, versus I think  
3 Scott Township, Pennsylvania, United States Supreme Court in  
4 2019. I don't have the numbers in front of them. But under  
5 federal law of *Knick*, United States Supreme Court, the taking  
6 happens when you lose the right to your property. And if under  
7 Michigan law, under *Rafaeli*, you can't have a taking until it's  
8 sold at auction for more than [indiscernible], and that's what  
9 Judge Viviano is saying creates, I don't know, absurd results,  
10 possibly. But the court isn't finished -- I don't believe the  
11 Michigan Supreme Court's finished adjudicating these rights.

12 But for the purpose of preclusion doctrine, in  
13 Michigan, if Mr. Knoblock's arguing that this was already  
14 decided because the county took the title, that's not Michigan  
15 law of -- the property right happens somewhere down the road or  
16 in our case it never happens. So how could that be precluded?  
17 It's sort of like -- it's sort of convoluted, but that's where  
18 we're at.

19 So I think there's a point worth noting. But then  
20 again, I get back to the *Harrison versus Montgomery* case.  
21 These people never really had a chance. Under existing  
22 Michigan law at the time they couldn't go to federal court and  
23 they could only sue on due process rights. And if -- well,  
24 that's one issue.

25 The other thing to understand is the talk about unjust

1 enrichment, there were -- the Southfield officials and the  
2 Southfield Non-Profit officials and the people, they were the  
3 same people. You know, there was no -- they were definitely  
4 intertwined. And there are allegations that, you know, we've  
5 had discovery, but there are allegations that Southfield  
6 officials were being paid money from the SNRI. Even the  
7 Michigan Court of Appeals in *Jackson versus Oakland County*  
8 found that there were conflicts of interest and it was  
9 unconscionable conduct. But that was pre-*Rafaeli*, and then  
10 that case was remanded. So I don't think the story is over on  
11 that.

12 THE COURT: Do you have the cite again for *Jackson*  
13 *versus Oakland County*?

14 MR. SMITH: I believe it's -- that's the court of --  
15 there's two cases --

16 THE COURT: Michigan Court of Appeals?

17 MR. SMITH: Yeah. The Court of Appeals, there's also  
18 the remand. I believe they're part of the record, both of  
19 them.

20 THE COURT: Okay.

21 MR. SMITH: I don't have them.

22 THE COURT: Okay.

23 MR. SMITH: Counsel did a great job of getting all the  
24 cites. I commend him for that.

25 So, Your Honor, there are allegations that these

1 people were paid money for taking these houses. They said that  
2 they were going to get the houses for -- to get rid of rentals,  
3 to help the housing start, but, in fact, the City of Southfield  
4 and there's resolutions that are wrong, they list the wrong  
5 entity of which -- and they say that they're going to give them  
6 to habitat of humanity. Well, they did a few of them for show.  
7 But the City of Southfield is really a mere conduit as far as  
8 the titles go. As far as getting -- and these are factual  
9 allegations. And they're more than plausible on the public  
10 record. The City of Southfield, their officials did pay  
11 employees with proceeds from these houses. They'd use city  
12 officials --

13 THE COURT: Wait. Are you saying -- you're saying  
14 that the Southfield officials were paying employees of what  
15 entity, Southfield employees? And to do what? I didn't --

16 MR. SMITH: Two things. The City of Southfield was  
17 using their employees to do the work of the nonprofits like to  
18 evict people for one, to go to their house and make sure they  
19 went out, got out of their house, to serve them process. And  
20 they --

21 THE COURT: Was this based upon the foreclosure sale  
22 that the county did and, therefore, the people were required to  
23 leave the house?

24 MR. SMITH: No. This was based -- this happened way  
25 after the foreclosure. This happened after the SNRI,

## ARGUMENT BY MR. SMITH

44

1 Mr. Nicols' client got title for paying \$1 for the property and  
2 then the -- people worked for the housing department would --  
3 they would get paid to do tasks for the SNRI --

4 THE COURT: Is that in the complaint? Is that in the  
5 complaint anywhere?

6 MR. SMITH: Honestly, Your Honor, I've done so many  
7 complaints on these issues, I can't recall the paragraph. If  
8 that becomes an issue, I would ask leave to amend.

9 THE COURT: We're not going there. We have tons of  
10 stuff on this case. You know, I'm just saying what we have so  
11 far that I've read which is what's before the Court. But  
12 you're saying that they used -- like SNRI used city people --  
13 city employees to evict people who were in the house that had  
14 been foreclosed upon and that title had gone from them so they  
15 were living there without justification?

16 MR. SMITH: I believe the complaint is talking -- what  
17 I'm saying is that Southfield employees in paragraphs 63, 64,  
18 65, 67 about the Southfield employees would do the -- would  
19 do -- they would do a number of things. The building  
20 department would basically find these properties and make sure  
21 there was no code problems. If you remember, there was no  
22 mortgages on any of these properties and --

23 THE COURT: Well, wait, let's stop. Stop one second.  
24 I'm reading paragraph 63. You're saying that Siver, Zorn, and  
25 Susan Ward-Witkowski wrongfully used their offices and

## ARGUMENT BY MR. SMITH

45

1 implemented the scheme under color of official right. 64,  
2 those people abused the power under the GPTA for personal  
3 economic gain and to augment their power. And then you're  
4 saying that -- I don't see anything about using city employees,  
5 stuff like that in those --

6 MR. SMITH: They are city employees. Identified Zorn.  
7 Susan Ward-Witkowski was a city employee at the time, and her  
8 husband Gerald was. And these people were paid, and they were  
9 paid money from the city -- --

10 THE COURT: They were paid salaries from the city,  
11 right? They got salaries from the city for their jobs.

12 MR. SMITH: They got additional checks also from the  
13 SNRI, checks while they were working for the city.

14 THE COURT: Is there anything in the complaint that  
15 says that?

16 MR. SMITH: It specifically --

17 THE COURT: That's, you know, a significant factual  
18 issue that's not in the complaint. So, anyway, go ahead  
19 further.

20 MR. SMITH: Well, it's implied. I don't remember  
21 reading it in discovery. But in other cases I found checks and  
22 bank accounts which will prove what I'm saying.

23 And Miss Rivid (phonetic), who is on SNRI, she is a  
24 real estate broker. She got paid by them. I talk about in  
25 paragraph 65 obtained favors, graft. I mean there's enough

1 here certainly to make -- connect the dots, I think.

2 So I mean these outfits were connected. Zorn was on  
3 both boards. The city of -- the city was -- the city didn't  
4 even put up the money to pay the taxes on the house which is  
5 highly unusual, or did the SNRI. The non-profit did, and then  
6 the money's intermingled between SNRI and Southfield non-profit  
7 housing association which was started for benevolent purposes  
8 by real estate investors like Gilbert Silverman which has been  
9 totally overtaken and used as just a means to amass equity of  
10 people. Has no public purpose.

11 Southfield -- Southfield is a privity under the old  
12 act with Oakland County, and the focus of a takings claim isn't  
13 necessarily what the government gets, it's what they take away  
14 from the people, and the interactions which could amount to a  
15 civil conspiracy between the SNRI Southfield was definitely --  
16 had the result of depriving citizens of their property and not  
17 for a public purpose, for a private -- supposedly private  
18 company which wasn't really independent. There's like  
19 collusion and conflict of interest all over the place.

20 So and just one other -- a few other points that  
21 Mr. Knoblock touched on. Miss Hall was a defendant who is  
22 represented by legal aid, and then the person who represented  
23 her was a law student, then became a member of his firm that  
24 was brought to the attention to the Court a long time ago. The  
25 actual -- I think he's right, she did sign a document under the

## ARGUMENT BY MR. SMITH

47

1 law student's direction to dismiss the case --

2 THE COURT: Wait a minute. The law student directed  
3 somebody to do something? I think there was an affidavit  
4 saying that the student did not participate in any aspect of  
5 the case. Wasn't there?

6 MR. SMITH: No. Well, the way I understood it is that  
7 the student joined Mr. Knoblock's law firm and when she joined  
8 the firm, she didn't participate, but she did represent  
9 Miss Hall and it was disclosed, which it was supposed to be,  
10 under the local court rules. And I believe I filed a paper, I  
11 [indiscernible] to the Court's direction, whether it was  
12 proper.

13 My point is that the actual dismissal order was  
14 without prejudice. Whether it was just a technicality, I  
15 mean -- and another thing, there's no final judgment in this  
16 case. To the extent that there is controlling authority like  
17 *Montgomery* on the *Harrison versus Montgomery County* under --  
18 which affects the res judicata decisions, the Court could  
19 change its mind at this point. That's why it's not without  
20 prejudice. And so the -- so I think the preclusion arguments  
21 are no longer valid and they don't affect all the plaintiffs.

22 And then, finally, there's a discussion of *Nelson v.*  
23 *New York*. *Nelson versus New York* actually supports our  
24 position. It doesn't hurt our position. And in *Nelson* the  
25 Supreme Court of the United States, 1956, was interpreting a

## ARGUMENT BY MR. SMITH

48

1 New York statute that allowed a former property owner to redeem  
2 and then sue for their equity. They never took advantage of  
3 that, so the ruling was basically that they -- a municipality,  
4 in this case it was New York, had to give a property owner a  
5 reasonable chance to get their equity under the Fifth  
6 Amendment. And even *Rafaeli*, when it talked about the case  
7 ended up with the conclusion, it said on page 487, 505 Mich. --  
8 well, I'm sorry, 505 Mich. 519, it says, "The better view under  
9 the law described is that the property taken is the taxpayer's  
10 equity, that this occurs when title vests in the government  
11 with no opportunity for redemption." In that circumstance, if  
12 the government retains the property, the taxpayer would be able  
13 to seek compensation for the deprivation of his or her equity.

14 THE COURT: Now, here, didn't the title vest in  
15 Oakland County initially? --

16 MR. SMITH: It did, but there was no cause of action  
17 certainly under the federal Constitution and under the Michigan  
18 Constitution. Under *Rafaeli* there's no cause of action until  
19 it was sold at auction, and we're circling back to the same  
20 argument. What -- the Court didn't rule on the situation where  
21 there was no auction, and so by all the principles of the  
22 common law from the Magna Carta on down, there was a property  
23 right, it just hadn't been resolved to anyone's satisfaction.  
24 What happens when a government entity holds onto it. Well,  
25 under the new law, we know it happens to get fair market value.



## FURTHER ARGUMENT BY MR. KNOBLOCK

1 And as the Court knows, an issue of fair market value even in  
2 the basic situation where it's sold at auction, that's on  
3 appeal to the Sixth Circuit as well. I mean I could see if the  
4 Court wanted to stay this case because there's two cases at the  
5 Sixth Circuit that may impact this case, the *Freed versus*  
6 *Thomas* case and the *Fox versus Saginaw County* case.

7 I appreciate your time, Your Honor.

8 THE COURT: Okay. Just to help Mrs. Lizza, *Freed* is  
9 F-R-E-E-D. Okay. Thank you, Mr. Smith.

10 Let me ask if the moving party wishes to respond --  
11 reply, I should say, briefly.

12 MR. KNOBLOCK: Yes, just briefly, Your Honor, thank  
13 you. And, again, Michael Knoblock on behalf of the Southfield  
14 defendants.

15 Even after pointing out through briefing, through oral  
16 argument, and in other cases that no legal authority has been  
17 cited that states that there's a property interest in this  
18 alleged equity, we still are not being given that authority  
19 because no legal authority exists for that. I think that's the  
20 very central important part of this issue, and Mr. Smith wants  
21 to get bogged down in different details and facts that he did  
22 not plead in his complaint, but the fact of the matter is these  
23 claims fall like a house of cards without that property  
24 interest. And the only two things I heard him refer to in his  
25 response was a brief mention of something about the Magna Carta

1 and extending *Rafaeli* and relying on Justice Viviano's  
2 dissent -- concurring opinion, rather. One of the seven  
3 justices with the other majority going against what he said  
4 knowing full well that that was his position in rejecting. So  
5 I think it's important to focus on the point that they have not  
6 identified that they have any right to this alleged equity in  
7 the property.

8 Now, as far as, you know, the process of when, you  
9 know a taking occurs and something like that, the Supreme Court  
10 in *Rafaeli* recognized that title vests absolutely in the  
11 Oakland County Treasurer after the property's foreclosed and  
12 the redemption period passes. After that there's no further  
13 redemption rights available to the delinquent taxpayer, and  
14 that's 505 Mich. at 445. They went on to hold that the only  
15 potential remaining interest that remains with the former  
16 property owner is in surplus proceeds from a tax foreclosure  
17 sale to the extent that they exist, no more, no less. And  
18 that's at pages 483 to 484 and note 134.

19 So, again, Your Honor, without identifying what the  
20 property interest is legally, their claims fail. And as far as  
21 any other issues that this Court has already decided in Oakland  
22 County's motion to dismiss, that's the law of the case and the  
23 Court should follow those holdings accordingly. Thank you.

24 THE COURT: What about the claims of the dual  
25 loyalties? One, Mr. -- Mayor Siver, and Mr. Zorn, their

## FURTHER ARGUMENT BY MR. KNOBLOCK

1 loyalty to the city and then loyalty to an entity that the city  
2 transfers property to. Does that create a due process issue?

3 MR. KNOBLOCK: I don't believe that it does, and going  
4 back, first of all, again, that's sort of putting the cart  
5 before the horse because that's getting more to the arbitrary-  
6 and-shocks-the-conscious analysis. Before you can even get  
7 that analysis, you have to identify property interest which  
8 they have not done. Further, any of these allegations that  
9 Mr. Smith just recited are not in the complaint and I haven't  
10 seen any authority that he has cited or given any legal basis  
11 to this court that's showing that, you know, wearing these dual  
12 hats creates some sort of substantive due process claims.

13 THE COURT: Okay. Thank you.

14 MR. SMITH: Your Honor, could I make one --

15 THE COURT: No, we've gone through it and we have it  
16 all, and I don't want to extend further.

17 So the Court thanks the parties. It's been a very  
18 interesting case, still is, and the Court will take these  
19 motions under advisement and render an opinion, but I want to  
20 thank counsel on both sides in both cases for highlighting  
21 their particular points. And good afternoon to all. We are  
22 adjourned. Thank you.

23 MR. KNOBLOCK: Thank you, Your Honor.

24 MR. NICOLS: Thank you.

25 (Proceedings concluded, 4:00 p.m.)

- - -  
CERTIFICATION OF REPORTER

I, Leann S. Lizza, do hereby certify that the above-entitled matter was taken before me at the time and place hereinbefore set forth; that the proceedings were duly recorded by me stenographically and reduced to computer transcription; that this is a true, full and correct transcript of my stenographic notes so taken; and that I am not related to, nor of counsel to either party, nor interested in the event of this cause.

S/Leann S. Lizza 11-30-2021

Leann S. Lizza, CSR-3746, RPR, CRR, RMR, RDR Date